

STATE OF MICHIGAN
COURT OF APPEALS

ALLEN WAYNE OUMEDIAN and SARAH
OUMEDIAN,

UNPUBLISHED
January 20, 2015

Plaintiffs-Appellants,

v

No. 318587
Livingston Circuit Court
LC No. 11-025741-CZ

BAMA BAR, INC., d/b/a STOUT IRISH BAR,

Defendant-Appellee,

and

NICHOLAS R. STELLHORN, GARY SABIN,
and HR ELITE SERVICES, LLC,

Defendants.

Before: TALBOT, C.J., and CAVANAGH and M. J. KELLY, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the trial court properly dismissed the premises liability and negligent hiring, training, and supervision claims alleged by plaintiffs, Allen Wayne Oumedian and Sarah Oumedian, against defendant, Bama Bar, Inc. However, because there is evidence that would permit a reasonable fact-finder to conclude that Bama Bar exercised sufficient control over defendants, Nicholas R. Stellhorn and Gary Sabin, to warrant the imposition of vicarious liability, I conclude the trial court erred when it dismissed Allen and Sarah Oumedian's claim premised on respondeat superior. Therefore, I must respectfully dissent.

With scant analysis, the majority cites *Hoffman v JDM Assoc, Inc*, 213 Mich App 466; 540 NW2d 689 (1995), for the proposition that "the evidence relied on by plaintiffs was insufficient to establish that defendant retained and exercised the requisite control to make it vicariously liable for any negligence of HR Elite, Stellhorn and Sabin." But a complete reading of the decision in *Hoffman* demonstrates that it can be distinguished from the facts of this case.

In that case, Duane Hoffman worked for Shape Corporation and was injured when a worker drove a forklift over his foot. *Id.* at 467. The driver of the forklift was a temporary worker assigned to Shape's plant by JDM Associates, Inc, which did business as Manpower of Muskegon. *Id.* Hoffman sued JDM Associates on the theory that it was liable for its employee's tort under the doctrine of respondeat superior. *Id.* The trial court determined that JDM Associates could not be held liable and Hoffman appealed. *Id.*

In order to determine whether JDM Associates could be liable for its employee's torts during the time that the employee was lent out to another business, the Court in *Hoffman* applied the common-law control test:

"The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person." [*Id.* at 468-469, quoting *Janik v Ford Motor Co*, 180 Mich 557, 562; 147 NW 510 (1914).]

Using this test, the Court in *Hoffman* concluded that JDM Associates did not retain sufficient day-to-day control over the employee to give rise to vicarious liability for his torts. *Id.* at 473. While JDM Associates paid the temporary worker's wages and had the right to terminate his employment, it was Shape that tested and trained the worker on the forklift and assigned him a specific job each day. *Id.* Absent control over the detailed activities of the temporary worker, the Court concluded, JDM Associates could not be held liable under the doctrine of respondeat superior. *Id.*

Unlike the situation in *Hoffman*, there are factual questions not only as to whether Bama Bar actually exercised control over the workers at issue, but also—and importantly—whether it retained the right to exercise such control. Discovery revealed that, because of a long history of fights on the premises, Bama Bar retained defendant, HR Elite Services, to provide security. But Bama Bar did not give Elite carte blanche authority to handle security in whatever way it wished. Indeed, testimony from the bar's general manager established that Elite's employees, Stellhorn and Sabin, were advised that the policy of the bar was that they were not to put hands on customers; rather, they were told that the "first route is a pleasant conversation" and, in the event that there was a situation that they couldn't handle through verbal persuasion and direction, they were to report it to the manager on duty and call the police. This testimony permits an inference that Bama Bar retained the right to control the security personnel assigned by Elite to work at the bar and actually exercised that control. Accordingly, the trial court erred when it dismissed Allen and Sarah Oumedian's claim for vicarious liability against Bama Bar.

For this reason, I would reverse in part.

/s/ Michael J. Kelly